Supreme Court, U.S.
FILED
MAR 2 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1353

JOSEPH BURTON KING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES R. WYRSCH
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Opinions Below 1
Jurisdiction 1
Question Presented 2
Constitutional and Other Provisions Involved 3
Statement 6
Reasons for Granting the Writ 9
Conclusion 16
Appendix A—Opinion, United States Court of Appeals, Eighth Circuit A1
Appendix B—Motion for Rehearing Denied A9
Appendix C—Attorney General's Order on "Jeopardy" Cases (New York Times) A10

Citations

Cases

Abbate v. *U.S.*, 359 U.S. 187 (1959) 9
Abbott v. *Laurie*, 422 F.Supp. 976 (D R.I. 1976) 12
Ackerson v. *U.S.*, 419 U.S. 1099 (1975) 12, 16
Bartkus v. *Illinois*, 359 U.S. 121 (1959) 9
Berger v. *U.S.*, 295 U.S. 78 (1935) 14
Blackledge v. *Allison*, 431 U.S. 63 (1977) 13
Borden-Kircher v. *Hayes*, 434 U.S. 357 (1978) 13
Bridges v. *Wixom*, 326 U.S. 125 (1944) 10, 15
Brown v. *Ohio*, 432 U.S. 161 (1977) 9
Croucher v. *U.S.*, 429 U.S. 1034 (1977) 12, 16
Dugan v. *U.S.*, 521 F.2d 231 (CA5 1975) 13
Ellingbury v. *Lockhart*, 397 F.Supp. 771 (ED Ark. 1975) 12
Field v. *Boyle*, 503 F.2d 774 (CA7 1974) 12
Frakes v. *U.S.*, 436 U.S. 911 (1978) 12, 15-16

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 9
Gisser v. *U.S.*, 513 F.2d 862 (CA5 1975) 13
Harris v. *Oklahoma*, 433 U.S. 682 (1977) 9
Hayes v. *Cowan*, 547 F.2d 42 (CA6 1976), *rev'd sub nom.*, *Borden-Kircher* v. *Hayes*, ... U.S. ..... (1978) 14
Hayles v. *U.S.*, 419 U.S. 892 (1974) 12, 16
James v. *Rodrigues*, 553 F.2d 59 (CA10 1977) 14
Jacobs v. *Kunes*, 541 F.2d 222 (CA9 1976) 12
Lisenba v. *California*, 314 U.S. 219 (1941) 9
Maraker v. *U.S.*, 370 U.S. 723 (1962) 12, 16
Petite v. *U.S.*, 361 U.S. 519 (1960) 11, 12
Rinaldi v. *U.S.*, 434 U.S. 22 (1977) 12, 16
Sangamon Valley Televison Corp. v. *U.S.*, 269 F.2d 221 (CA DC 1969) 15
Sellars v. *Estelle*, 400 F.Supp. 854 (SD Tex. 1975), *aff'd* with opinion, 536 F.2d 1104 (CA5 1976), *cert. den.*, 429 U.S. 1076 (1977) 11
Service v. *Dulles*, 354 U.S. 363 (1957) 10, 15
Smith v. *Resor*, 406 F.2d 141 (CA2 1969) 14
Thomas v. *Cunningham*, 313 F.2d 934 (CA4 1963) 11
U.S. v. *Brown*, 500 F.2d 375 (CA4 1974) 13-14
U.S. v. *Crawford*, 466 F.2d 1155 (CA10 1972) 15
U.S. v. *Crusco*, 536 F.2d 21 (CA3 1976) 13
U.S. v. *deMarco*, 550 F.2d 1224 (CA9 1977), *cert. denied*, 46 U.S. Law Week (Oct. 4, 1977) 14
U.S. v. *Heffner*, 420 F.2d 809 (CA4 1970) 14
U.S. v. *Hutul*, 416 F.2d 607 (CA7 1969) 15
U.S. v. *Lanza*, 260 U.S. 377 (1922) 9
U.S. v. *Leahey*, 434 F.2d 7 (CA1 1970) 14
U.S. v. *Wheeler*, 435 U.S. 313 (1978) 9
U.S. ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 10, 15

U.S. ex rel. Brooks v. *Clifford*, 409 F.2d 700 (CA3 1969) 14
U.S. ex rel. Smith v. *Baldi*, 192 F.2d 540 (CA3 1951), *aff'd*, 344 U.S. 561 (1953) 11
U.S. ex rel. Walker v. *Twomey*, 484 F.2d 874 (CA7 1973) 12
U.S. ex rel. Wolfish v. *U.S.*, 406 F.Supp. 1243 (SD NY 1976); 428 F.Supp. 333 (SD NY 1976); 439 F.Supp. 104 (SD NY 1977), *aff'd* in pertinent part *sub nom.*, *Wolfish* v. *Levi*, 573 F.2d 118 (CA2 1978) 11
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 10, 15
Watts v. *U.S.*, 422 U.S. 1032 (1975) 12, 16
Welch v. *Beto*, 355 F.2d 1016 (CA5 1966) 11-12
Yellin v. *U.S.*, 374 U.S. 109 (1963) 10, 15

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment V, United States Constitution 2, 3, 9, 12, 13
Amendment XIV, United States Constitution 2, 3, 12, 13
18 USC 1343 6
28 USC 1254(1) 2

MISCELLANEOUS

"Manual for United States Attorneys", 1/10/77, Sections 9-2.142—9-2.143 10
Policy of the Attorney General of the United States Instituted April 5, 1959 3
"The Petite Policy: An Example of Enlightened Prosecutorial Discretion", 66 Georgetown L.J. 1137 (1978) 11, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

JOSEPH BURTON KING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Joseph Burton King, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A8) and the opinion of the Court of Appeals on motion for rehearing or in the alternative, for rehearing en banc are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1978. Petitioner's timely motion for rehearing or alternatively, for rehearing en banc, was de-

nied on February 9, 1979 (App. B, *infra*, p. A9). This Honorable Court's jurisdiction is invoked pursuant to 28 USC 1254(1).

QUESTION PRESENTED

1. Whether the United States Government is precluded from prosecuting a defendant after a state (Missouri) has undertaken to prosecute on the identical charges and where, as here, the United States Government has not secured authorization from the Attorney General of the United States, in contravention of the so-called "petite" policy approved by this Honorable Court.

(a) Is the government obligated to adhere to its own policy, established over 20 years ago and never since repealed or abolished?

(b) Is it a denial of fundamental fairness, inherent in the concept of due process and equal protection of the laws, Amendments V and XIV, United States Constitution, for the government to commence a prosecution after a state has undertaken to do so and further, where, as here, the government then proceeds to interefere in the pending state court matter, disrupting the plea bargaining process?

(c) Is there a conflict between the federal courts of appeals as to whether or not the government is bound to adhere to its own policy?

(d) Is there a conflict between the federal courts of appeals as to whether reversal of conviction and dismissal of the charges is required in event of dual prosecutions, the second having been the federal one?

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U. S. Constitution, Amendment Five.

Amendment Five

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment Fourteen.

Amendment Fourteen

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Policy of the Attorney General of the United States Instituted April 5, 1959.

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence

of a power to proscribe a defendant under both Federal and state law for the same act or acts. That power, which the court held is inherent in our Federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling.

In Abbate v. United States, and Bartkus v. Illinois the Supreme Court held that there is no violation of the double jeopardy prohibition, or of the due process clause of our Federal Constitution where there are prosecutions of the defendant, both in the state and in the Federal court based upon the same act or acts.

This ruling reaffirmed the holding in United States v. Lanza, 260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous court, said:

"We have here two sovereignties deriving power from different sources, capable of dealing with the same subject matter within the same territory. * * * Each Government, in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other.

"It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the Bartkus case the court said:

"The men who wrote the Constitution as well as the citizens of the member states of the confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the founders in devising a Federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when that Federal system yields results with which a court is in little sympathy."

The court held then that precedent, experience and reason supported the conclusion of separate Federal and state offenses.

It is our duty to observe not only the ruling of the court but the spirit of the rulings as well. In effect, the court said that although the rule of the Lanza case is sound law, enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment, it, like most rules of law could cause considerable hardship. Applied wisely, it is a rule that is in the public interest. Consequently, as the court clearly indicated, those of us charged with law-enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between Federal and state prosecutive officers is essential if the gears of the Federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or Federal,

where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and Federal law-enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event, I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no Federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the department. No such recommendation should be approved by the Assistant Attorney General in charge of the division without having it first brought to my attention.

STATEMENT

The Petitioner was proceeded against pursuant to a grand jury indictment returned in the Western District of Missouri and alleging three counts of violation of 18 USC 1343. The initial indictment was returned May 25, 1977 and a superceding indictment, adding a co-defendant, Bohr (not a party to this Petition), followed on September 1, 1977. Count III of the indictment was later dismissed by the Court.

The first trial to a jury commenced on October 25, 1977, resulting in declaration of mistrial, October 29, 1977, owing to the jury's inability to reach a verdict.

The second trial commenced on December 6, 1977, terminating on December 12, 1977 with a second declaration of mistrial because of the comments of counsel for the co-defendant, Bohr, in relation to this Petitioner.

The third trial commenced January 16, 1978, resulting in a verdict of guilty, January 18, 1978 and Petitioner was sentenced as follows: (a) as to Count I, six months imprisonment to be followed by 36 months probation; (b) as to Count II, a term of probation to run concurrently with that imposed on Count I, plus a fine of $1,000.00.

Petitioner was charged both in the Circuit Court of Mt. Vernon, Missouri and the Federal District Court for the same alleged act or transaction. [See R. 8/8/77, Motion to Quash; H.Tr. 9/7/77, pp. 118-120; Dec. H.Tr. pp. 3, 7, 8, 12-20, 23-47].[1]

Prior to the first trial, Defendant King moved to dismiss the Federal prosecution because of the failure to obtain the Attorney General's approval for the dual prosecution and on double jeopardy grounds [R. 8/8/77; H.Tr. 9/7/77, pp. 118-120], which by the court was overruled [R. 9/9/77]. Prior to the first trial of this cause, Defendant moved to compel the prosecution to obtain the Attorney General's approval for the prosecution of this

---

1. The Record in this case consists of the Transcript on Motions Prior to Trial (held on September 7, 1977), hereinafter referred to as "Sept. H. Tr. p. ....."; Partial Transcript of Proceedings of the First Trial (held on October 25, 1977), hereinafter referred to as "Oct. Tr. p. ....."; Partial Transcript of Proceedings of Second Trial (held on December 5 1977), hereinafter referred to as "Dec. Tr. p. ....."; Transcript of the Second Trial of this cause, filed in the case of *U.S.* v. *Kenneth Bohr*, in Case No. 78-1096, U. S. Court of Appeals for the Eighth Circuit, hereinafter referred to as "B.Tr. p. ....."; Hearing on Motions Prior to Trial held on December 5 and 6, 1977, hereinafter referred to as "Dec. H. Tr. p. ....."; and Transcript of Third Trial (held on January 16, 1978), hereinafter referred to as "Jan. Tr. p. ....."; and the Sentencing Transcript of April 4, 1978, hereinafter referred to as "S. Tr. p. .....". The Record also consists of the Certified Docket Entries (with Record) transmitted by the Clerk of the District Court to this Court on or about April 14, 1978. Same will be hereinafter referred to as "R. p. ..... (date of entry)".

cause, which was by the court denied [R. 10/12/77; 10/21/77]. Prior to the second trial of this cause in December, 1977, Defendant had entered into a plea bargain with the State Prosecutor. After the honorable trial court was informed of the plea bargain, the court announced its intention to dismiss the instant prosecution if the plea bargain with the State authorities was implemented. The court granted Defendant King's motion for a continuance so that he could implement the plea bargain in Mt. Vernon, Missouri. After Defendant made arrangements to go to Mt. Vernon, Missouri to implement the plea bargain, the Federal Prosecutor called the State Prosecutor and convinced him to withdraw his participation in the plea bargain. [See Dec. H.Tr. pp. 3, 7, 8, 12-20, 23-47.] After the disruption of the plea bargain agreement, Defendant moved to dismiss the Federal prosecution on the basis of prosecutorial misconduct and renewed his prior motions to dismiss the same were denied by the court. [See R. 12/5/77; 12/6/77; Dec. H.Tr. pp. 46; 23-25.]

After the jury's conviction in this case, Defendant again moved the court to dismiss the prosecution (see Motion for New Trial, etc. [R. 2/21/78]). Subsequently, the Defendant again moved the court for similar relief and plead at this time that he had plead guilty to the State charge arising out of this transaction and, since that court had rendered judgment and sentence upon him, that jeopardy had attached and the Federal District Court had no authority to proceed further and the charges should be dismissed [R. 2/27/78]. However, these latter motions were denied by the court [R. 3/7/78].

The Government to date has never obtained the approval of the Attorney General for the prosecution of this cause [Sept. H.Tr. pp. 118-120; R. 3/6/78—Govern-

ment's Reply Suggestions; Government's Brief in U. S. Court of Appeals below and Reply Suggestions to Appellant's Motion for Rehearing].

REASONS FOR GRANTING THE WRIT

1. Introduction.

The Petitioner herein has experienced dual prosecutions for what was indisputably the same criminal conduct. The first was commenced by the Prosecuting Attorney of Lawrence County, Missouri and thereafter, the second was undertaken by the Office of the United States Attorney for the Western District of Missouri.

Such undertakings by the United States in this case have been held not to offend the Double Jeopardy clause, Amendment V, U. S. Constitution, as such: see *U.S.* v. *Lanza*, 260 U.S. 377 (1922); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *U.S.*, 359 U.S. 187 (1959); *Brown* v. *Ohio*, 432 U.S. 161 (1977) (dictum); *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (same); *U.S.* v. *Wheeler*, 435 U.S. 313 (1978).

However, wholly apart from the double jeopardy argument, the Petitioner maintains that, on the facts of this case, the practice is offensive to concepts of fundamental fairness, which concepts are, in the eyes of this Court, the "very essence of due process of law." *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790 (1973); *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

Additionally it is urged that there has been a denial of equal protection of the laws and, finally, that the settled rule of law to the effect that a failure of a government agency to abide by its own rules or policy may, in a given case, amount to a deprivation of due process of law and clearly, this is precisely such a case.

1(a). The government, having established as a matter of policy 20 years ago that a federal prosecution could be commenced in addition to a state prosecution only in the rarest of circumstances, and then only with the approval of the Attorney General of the United States, is required to adhere to that policy so long as it remains in full force and effect.

Due process of law is violated by the failure to follow such regulations. The government is not required, constitutionally or otherwise, to create or thereafter alter administrative rules, regulations or policy. However, once a governmental agency determines to make or alter such administrative rules, regulations or policy, it is thereupon required to abide by them. *Bridges* v. *Wixom*, 326 U.S. 125 (1944); *U.S. ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Yellin* v. *U.S.*, 374 U.S. 109 (1963).

In 1959 the Attorney General of the United States commenced to require that federal prosecutions not be undertaken in addition to state prosecutions, except in very rare circumstances, and even then, not without first securing approval of the Attorney General himself. (See Appendix C, *infra*, the "Petite" policy.) That policy has never been deleted or altered at all. *See*: "Manual for United States Attorneys", 1/10/77, Sections 9-2.142-9-2.143, which states:

> "No federal case should be tried when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling federal interests for such prosecution.

> "No such recommendation may be approved by the Assistant Attorney General without having it first brought to the attention of the Attorney General."

See *Petite* v. *U.S.*, 361 U.S. 519 (1960); Note, "The Petite Policy: An Example of Enlightened Prosecutorial Discretion," 66 Georgetown L.J. 1137 (1978).

Here, the local federal prosecutor did not obtain, and in fact did not attempt to obtain, prior approval of the Attorney General of the United States, which approval is clearly required in each and every instance of dual prosecution and where the federal prosecution is subsequent to the state prosecution.

It is well settled law that not only is the Government obligated to adhere to its own rules, regulations and policy[2] once it elects to set forth such rules or policy, but also that a failure to follow given policy may amount to a denial of due process of law, guaranteed under the Fifth Amendment. The rule is well stated in *Sellars* v. *Estelle*, 400 F.Supp. 854 (SD Tex. 1975), *aff'd* with opinion, 536 F.2d 1104 (CA5 1976), *cert. den.*, 429 U.S. 1076 (1977):

> "A defendant is further entitled to have procedural due process observed in protection of his substantive due process would not compel the rights to be given." *Id.* 858. (Emphasis supplied.)

Accord, *U.S. ex rel. Smith* v. *Baldi*, 192 F.2d 540, 544 (CA3 1951), *aff'd.*, 344 U.S. 561 (1953); *Thomas* v. *Cunningham*, 313 F.2d 934, 937 (CA4 1963); *Welch* v. *Beto*, 355 F.2d

---

2. It is not valid answer that prosecutorial "policy" was ignored and subverted, rather than codified regulations. The government vainly argued to that effect in *U.S. ex rel. Wolfish* v. *U.S.*, 406 F.Supp. 1243 (SD NY 1976); 428 F.Supp. 333 (SD NY 1976); 439 F.Supp. 104 (SD NY 1977), *aff'd* in pertinent part *sub nom*, *Wolfish* v. *Levi*, 573 F.2d 118 (CA2 1978).

1016, 1019 (CA5 1966); *Field* v. *Boyle*, 503 F.2d 774, 779, f/n 6 (CA7 1974); *U.S. ex rel. Walker* v. *Twomey*, 484 F.2d 874, 874 (CA7 1973); *Jacobs* v. *Kunes*, 541 F.2d 222, 225 (CA9 1976); *Ellingburg* v. *Lockhart*, 397 F.Supp. 771, 776 (ED Ark. 1975); *Abbott* v. *Laurie*, 422 F.Supp. 976, 978 (D R.I. 1976). In this regard, it is noted that this Court has repeatedly given effect to the Petite policy and dismissed the prosecutions. *Frakes* v. *U.S.*, 436 U.S. 911 (1978); *Rinaldi* v. *U.S.*, 434 U.S. 22 (1977); *Croucher* v. *U.S.*, 429 U.S. 1034 (1977); *Watts* v. *U.S.*, 422 U.S. 1032 (1975); *Ackerson* v. *U.S.*, 419 U.S. 1099 (1975); *Hayles* v. *U.S.*, 419 U.S. 892 (1974); *Maraker* v. *U.S.*, 370 U.S. 723 (1962); *Petite* v. *U.S.*, *supra*. In each and every one of these cases, this Court has reversed denial of relief sought on the precise grounds herein contended.

1(b). Due process of law, Amendment V, United States Constitution, and equal protection of the laws, Amendment XIV, United States Constitution, were flagrantly denied where, as here, the federal prosecutor took it upon himself to interfere and intervene with the Missouri State Prosecutor, thereby seeking and obtaining a dismissal of the dismissal of the pre-existing state charges inasmuch as the learned federal trial judge had stated to the government attorney that he would dismiss the federal charges without hesitation once the bargained for plea was entered and judgment rendered in the state court.

In this matter, and as the government conceded in the court below, when the learned federal court stated, after being made aware of the existence of identical pending charges in Missouri regarding which Petitioner had entered into plea negotiations, that he could and would dismiss the federal charges once the plea was taken and judgment rendered upon it, Assistant United States Attorney immediately contacted the Lawrence County, Missouri Prosecutor in an effort to have the State Prosecutor "back off" the plea bargain, in order that the government's charges would not be dismissed. This the State Prosecutor agreed to and proceeded to have done.

The Petitioner then was put into the position of having his bargain, existing solely between himself and the State of Missouri, disrupted and put to an end because of the intervention of the government's attorney for the Western District of Missouri; and such was done with the plain intent of subverting the federal court that had stated on the record that disposition of the State charges would see a final dismissal of the then pending federal charges giving rise to this matter.

On the facts of this particular case, it is respectfully submitted that the actions of the prosecutor constituted gross abuse of discretion, constituted a denial of the Petitioner's right to due process of law, Amendment V, United States Constitution, and certainly amounted to a denial of equal protection of the laws, Amendment XIV, United States Constitution, as well.

This Court's recent holding in the matter of *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), and earlier in *Blackledge* v. *Allison*, 431 U.S. 63 (1977), make equally clear that prosecutorial discretion is by no means unlimited, and that ". . . there are undoubtedly constitutional limits upon its exercise." 434 U.S. at 368; 431 U.S. at 77. That "limitation upon prosecutorial discretion" was violated in this case by the government, not only by the violation of the "Petite Policy", *supra*, but by the Government's violation of Defendant's right to have the terms of his plea bargain enforced. See *U.S.* v. *Crusco*, 536 F.2d 21 (CA3 1976); *Dugan* v. *U.S.*, 521 F.2d 231 (CA5 1975); *Gisser* v. *U.S.*, 513 F.2d 862 (CA5 1975); *U.S.*

v. *Brown*, 500 F.2d 375 (CA4 1974). In addition, the Defendant is entitled to a fair and impartial prosecuting attorney. A prosecutor may not engage in conduct calculated to secure wrongful convictions. See *Berger* v. *U.S.*, 295 U.S. 78 (1935). Compare *James* v. *Rodrigues*, 553 F.2d 59 (CA10 1977) (prosecutor unconstitutionally interfered with right of appeal when he filed information under habitual criminal statute at retrial after reversal for conviction); *U.S.* v. *deMarco*, 550 F.2d 1224 (CA9 1977) (prosecutor unconstitutionally interfered with right to fair trial when he brought indictment on more serious charges penalized defendant for exercising venue rights), *cert. denied*, 46 U.S. Law Week (Oct. 4, 1977); *Hayes* v. *Cowan*, 547 F.2d 42 (CA6 1976), *rev'd sub nom. Borden-Kircher* v. *Hayes*, ... U.S. ..... (1978) (prosecutor unconstitutionally interfered with due process when he brought indictment under habitual criminal statute penalized defendant for refusing to plead guilty to indictment for unenhanced defense).

1(c). There is existing conflict between the federal intermediate courts as to whether a government agency is compelled to abide by its own rules, regulations or policy.

In the matter at hand, the Court of Appeals was of the view that the failure and refusal of the government to adhere to the so-called "Petite Policy" was not error. However, other Courts of Appeals have stated that in a wide variety of contexts, once the government creates rules, regulations or policy, then it is obligated to apply fairly and evenly the rule or policy that is applicable. Such has been held numerous times, as in *U.S.* v. *Leahey*, 434 F.2d 7 (CA1 1970); *U.S.* v. *Heffner*, 420 F.2d 809 (CA4 1970); *U.S. ex rel. Brooks* v. *Clifford*, 409 F.2d 700 (CA3 1969); *Smith* v. *Resor*, 406 F.2d 141 (CA2 1969); *Sangamon Valley Television Corp.* v. *U.S.*, 269 F.2d 221 (CA DC 1969).

Pursuant to this Court's holdings in *Bridges* v. *Wixom*, *Accardi* v. *Shaughnessy*, *Service* v. *Dulles*, *Vitarelli* v. *Seaton*, *Yellin* v. *U.S.*, all cited *supra*, it is clear that governmental policy and administrative rules, once created, are required to be followed until such time as the Government may see fit to alter or strike that policy or rule.

1(d). There exists conflict between the Courts of Appeals as to whether or not a second prosecution by the Government may be undertaken for what in reality is the same offense.

In this matter, the Court of Appeals for the Eighth Circuit refused relief to the Petitioner, reasoning that the Government need not adhere to its own policy, and further, that it may mount a second prosecution after the State has done so. The Court relied upon the holding of *U.S.* v. *Hutul*, 416 F.2d 607 (CA7 1969).

However, the rule elsewhere is different, as in *U.S.* v. *Crawford*, 466 F.2d 1155 (CA10 1972). There, Chief Judge Lewis, speaking for a unanimous court, invalidated the judgment of conviction with instructions to dismiss the underlying indictment, inasmuch as the defendant therein had been prosecuted at the State level for petty larceny of an automobile, only to be proceeded against by the United States Government. We submit that the brief opinion in *Crawford* is plainly at odds with the holding in regard to Petitioner herein, turning as it does upon *U.S.* v. *Hutul*, *supra*.

It is respectfully suggested that the correct rule is stated in *U.S.* v. *Crawford*, *supra*, and not as was stated by the Court of Appeals herein, and that such is made abundantly clear by this Court's decisions in *Frakes* v.

U.S., Rinaldi v. *U.S., Croucher* v. *U.S., Watts* v. *U.S., Ackerson* v. *U.S., Hayles* v. *U.S., Marakar* v. *U.S.*, and *Petite* v. *U.S.*, all cited *supra*.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit should be granted, Petitioner's conviction set aside, and this case remanded to the trial court with instructions to dismiss the indictment.

Respectfully submitted,

JAMES R. WYRSCH
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1286

United States of America,
Appellee,

v.

Joseph Burton King,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: September 11, 1978
Filed: October 5, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and BRIGHT, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

Defendant King was indicted on each of two counts of an indictment charging wire fraud in violation of 18 U.S.C. § 1343. He entered pleas of not guilty and was tried to a jury and convicted on both counts.[1] Defendant has taken a timely appeal from his conviction.

1. He was sentenced to forty-two months imprisonment on Count I with all but six months of the sentence suspended with a three-year period of probation to follow the six months of incarceration. On Count II defendant was fined $1,000 and given a three-year probation period to run concurrently with the probation imposed with respect to Count I.

Defendant was jointly indicted on each count with Louis K. Bohr. Bohr and King were tried jointly. On the first trial a mistrial was declared by reason of the inability of the jury to agree upon a verdict. On the second trial King on his own motion was granted a mistrial and a severance because of prejudicial remarks made in the presence of the jury by counsel for Bohr. The trial continued as to Bohr. He was convicted on both counts, his conviction was affirmed. *United States* v. *Bohr*, 581 F.2d 1294, (8th Cir. 1978).

Defendant relies upon the following points for reversal:

I. Prejudicial error in admitting hearsay evidence as to (a) phone calls between Ball and King, (b) testimony of police chief of a license check identifying King as owner of a car, and (c) a phone bill showing interstate calls between Ball and Benes.

II. Error in overruling defendant's motion for acquittal and giving certain instructions because there was no evidence that defendant had caused any radio or wire communications.

III. Failure to dismiss on the ground of double jeopardy and on the basis of the *Petite* policy.

IV. Error in admitting testimony concerning prior identification of King by use of photographic displays.

We reject each of such contentions and affirm for the reasons hereafter set out.

The evidence in the present case is substantially the same as that in the *Bohr* case and many of the contentions there made are raised here. The facts in connection with the fraudulent wire record are quite fully set out in the reported *Bohr* opinion. We will summarize the pertinent facts very briefly.

King approached Ball in an effort to sell him about 900 cans of Treflan which King claimed had been seized by the sheriff at Mount Vernon at a price of about one-half its value. This was more Treflan than Ball could handle. He made several phone calls to Mr. Benes, a friend in Nebraska, whom he thought might be interested. King was so advised and was later told that Benes approved of the deal and that it could be completed. Benes provided Ball with $35,000. Ball, as directed by King obtained a check to the county treasurer for $4,500 and obtained $32,000 in cash. King led Ball to Bohr who was introduced as a deputy sheriff who had handled the sale transaction. Ball gave Bohr the $4,500 check made out to the county and $31,740 in cash. Bohr advised Ball that he would have to go to the courthouse to get appropriate receipts and that he would return in fifteen minutes to complete the transaction. He never returned and Ball never recovered his money nor did he obtain the Treflan.

I.

No prejudicial error was committed in admitting evidence of phone calls between King and Ball. King met Ball on a number of occasions and had occasion to be familiar with his voice. Moreover, Ball met King at the time and place agreed upon in the phone calls. This constitutes strong circumstantial evidence adequate to establish the admissibility of the phone calls. *United States* v. *Biondo*, 483 F.2d 635, 644 (8th Cir. 197), *cert. denied*, 415 U.S. 947 (1974).

Police Chief Pendleton was asked to investigate a suspicious parked car in Mount Vernon at a time relevant to the transactions here involved. He caused a license check to be made and reported that the car was owned by Joseph B. King. Additionally at the trial three cer-

tified documents of the Missouri Department of Revenue were received in evidence showing King's ownership of the automobile. Such documents are admissible as public records under Fed. R. Evid. Rule 803(8) or 803(24). No prejudicial error was committed in receiving the exhibits showing the ownership of the car in question to be in defendant King. The apparent purpose of the evidence was to show King's presence in Mount Vernon.

Walter Ball testified he placed telephone calls from Missouri to Benes at Valparaiso, Nebraska, on April 19 and April 21, 1971, and Benes testified to receiving such calls. In addition, the court received in evidence the telephone bill charging these three calls to Mr. Ball. The bill would appear to be properly admissible as a business record. In any event, no prejudicial error was committed as both Ball and Benes testified such calls were made.

II.

The district court did not commit error in denying defendant's motion for acquittal. Ball positively testified that he was calling a friend in Nebraska about the purchase of the Treflan and that the call was made with the knowledge and approval of the defendant.

A further contention is made that part of the interstate telephone call may possibly have been carried in part by microwave and hence would not constitute a wire or radio communication within the meaning of § 1343. We specifically rejected such contention in *Bohr, supra,* and adhere to the view there expressed.

III.

Defendant makes two contentions that the prosecution is barred by double jeopardy. Defendant relies on *United States* v. *Martin,* 561 F.2d 135 (8th Cir. 1977), to support

his contention. While double jeopardy was applied in *Martin,* that case is factually distinguishable. As stated in *Martin*:

> The Double Jeopardy Clause generally would not stand in the way of reprosecution where the defendant has requested a mistrial. *Lee* v. *United States,* ..... U.S. ....., ..., 97 S.Ct. 2141, 53 L.Ed.2d 80 (1970); *United States* v. *Jorn, supra,* 400 U.S. at 485, 91 S.Ct. 547. The Supreme Court has recognized, however, limited circumstances where a defendant's mistrial request does not remove the Double Jeopardy bar. For example, the Double Jeopardy Clause protects a defendant against governmental actions intended to provoke mistrial requests. *United States* v. *Dinitz, supra,* 424 U.S. at 611, 96 S.Ct. at 1075. It bars retrials where the underlying error is "motivated by bad faith or undertaken to harass or prejudice" the defendant. *United States* v. *Dinitz, supra,* 424 U.S. at 611, 96 S.Ct. at 1082. Thus, where "prosecutorial overreaching" is present, *United States* v. *Jorn, supra,* 400 U.S. at 485, 91 S.Ct. at 547, the interests protected by the Double Jeopardy Clause outweigh society's interest in conducting a second trial ending in acquittal or conviction. *United States* v. *Kessler,* 530 F.2d 1246, 1255-56 (5th Cir. 1976). *See United States* v. *Wilson,* 534 F.2d 76, 80 (6th Cir. 1976).

561 F.2d *supra,* at 138-39. See also Judge Henley's dissenting opinion at 141-42.

In *Martin* the court found that material prosecutorial misconduct existed based on the fact that extensive immaterial and prejudicial Grand Jury testimony was read to the jury by the prosecutor over defendant's objection and after court admonition not to read irrelevant statements.

No such situation exists in the present case. The error on which the mistrial was granted was based upon a statement made by counsel for co-defendant Bohr which the court found to be prejudicial. We hold that this is not the exceptional type of case where the underlying error is motivated by bad faith on the part of the prosecutor or undertaken to harass or prejudice the defendant. The court properly denied defendant's double jeopardy contention.

Additionally defendant raises the issue that he is being prosecuted by both the federal and the state government for conduct arising out of the same transaction. Double jeopardy does not protect a defendant from prosecution for the same offense by different sovereigns. *United States* v. *Wheeler*, ... U.S. ....., 46 U.S.L.W. 4243, 4244 (March 22, 1978).

Additionally defendant claims that under the *Petite* policy[2] the court failed to dismiss the indictment. In 1959 the then Attorney General Rogers in a press release and letters to United States Attorneys indicated that both federal and state prosecutions should not be pursued without approval of the Attorney General. The enforcement of such policy, if still in effect, lies with the Attorney General and an individual defendant cannot avoid prosecution on the basis of this policy. No cases have been cited which support the right of an individual to seek a dismissal on the basis of the *Petite* policy. In *United States* v. *Hutul*, 416 F.2d 607, 626-27 (7th Cir. 1969), the court holds:

> Finally, we reject defendant Hutul's contention that his prosecution was without Government authority and therefore void. Defendant rests his argument

2. *See Petite* v. *United States*, 361 U.S. 529 (1960); *United States* v. *Wallace*, 578 F.2d 735 (8th Cir. 1978.)

> on an April 6, 1959 press release of the Attorney General of the United States which stated that permission should be obtained from his office by a United States Attorney before the latter prosecutes a case when there has been an earlier state prosecution for substantially the same act. (See Petite v. United States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960)). Since such permission was not obtained in the present prosecution, defendant Hutul argues, it was without Government authority and void.
>
> We disagree. A letter, press release, or similar statement by the Attorney General, which is not promulgated as a regulation of the Justice Department and published in the Federal Register, cannot serve to invalidate an indictment returned by the Grand Jury. Rather, such a statement is merely a "housekeeping provision" of the Justice Department and is so limited in its effect. Sullivan v. United States, 348 U.S. 170, 173, 75 S.Ct. 182, 99 L.Ed. 210 (1954).

We agree with the above statement. Moreover, in our present case no conviction or acquittal had been obtained in the state litigation. The federal conviction occurred prior to any disposition of the state litigation. Hence, we do not have a situation where a defendant has been convicted by both the federal government and the state for the same offense.

The trial court properly found upon the basis of substantial evidence, including that of the state's attorney, that the United States Attorney had not exerted any pressure upon the state prosecution in connection with pending state plea bargaining. The court upon the basis of the facts before it committed no error in refusing to dismiss the case upon the basis of the *Petite* policy.

IV.

No error was committed in allowing witnesses to testify with respect to their pretrial identification of defendant in a photographic line-up which took place shortly after the offense here involved. The trial court, after an evidentiary hearing, found that the photographic line-up was fairly conducted and such view has full support in the evidence.

Defendant contends that the photographic identification testimony does not meet the hearsay exception of Fed. R. Evid. Rule 801(d) (1) (C). A similar contention was rejected by the Second Circuit in *United States* v. *Marchand*, 564 F.2d 983, 996-97. We agree with such determination.

In any event, the in-court identification of the defendant upon the basis of ample opportunity to observe the defendant at the time of the offense is strong and no prejudicial error was committed in receiving the photographic evidence.

Our review of the record upon the basis of the errors asserted convinces us that the defendant has had a fair trial, that no prejudicial error has been committed and that the conviction should be and is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1286

September Term, 1978

United States of America,
Appellee,

vs.

Joseph Burton King,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Judge Heaney would have granted the petition for rehearing en banc. Judge McMillian did not participate in the voting.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 9, 1979

APPENDIX C

THE ATTORNEY GENERAL'S ORDER ON 'JEOPARDY' CASES

Special to The New York Times.

WASHINGTON, April 5—Following is the text of Attorney General William P. Rogers' memorandum to Federal attorneys today on double jeopardy cases:

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both Federal and state law for the same act or acts. That power, which the court held is inherent in our Federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling.

In Abbate v. United States and Bartkus v. Illinois the Supreme Court held that there is no violation of the double jeopardy prohibition, or of the due process clause of our Federal Constitution where there are prosecutions of the defendant, both in the state and in the Federal court, based upon the same act or acts.

This ruling reaffirmed the holding in United States v. Lanza, 260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous court, said:

"We have here two sovereignties deriving power from different sources, capable of dealing with the same subject matter within the same territory. * * * Each Government, in determining what shall be an offense against

its peace and dignity, is exercising its own sovereignty, not that of the other.

"It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the Bartkus case the court said:

"The men who wrote the Constitution as well as the citizens of the member states of the confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the founders in devising a Federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when that Federal system yields results with which a court is in little sympathy."

The court held then that precedent, experience and reason supported the conclusion of separate Federal and state offenses.

It is our duty to observe not only the ruling of the court but the spirit of the rulings as well. In effect, the court said that although the rule of the Lanza case is sound law enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment, it, like most rules of law could cause considerable hardship. Applied wisely, it is a rule that is in the public interest. Consequently, as the court clearly indicated, those of us

charged with law-enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between Federal and state prosecutive officers is essential if the gears of the Federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or Federal where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and Federal law-enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event, I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no Federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the department. No such recommendation should be approved by the Assistant Attorney General in charge of the division without having it first brought to my attention.